141-174

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 238.

WARD McALLISTER, JR., APPELLANT,

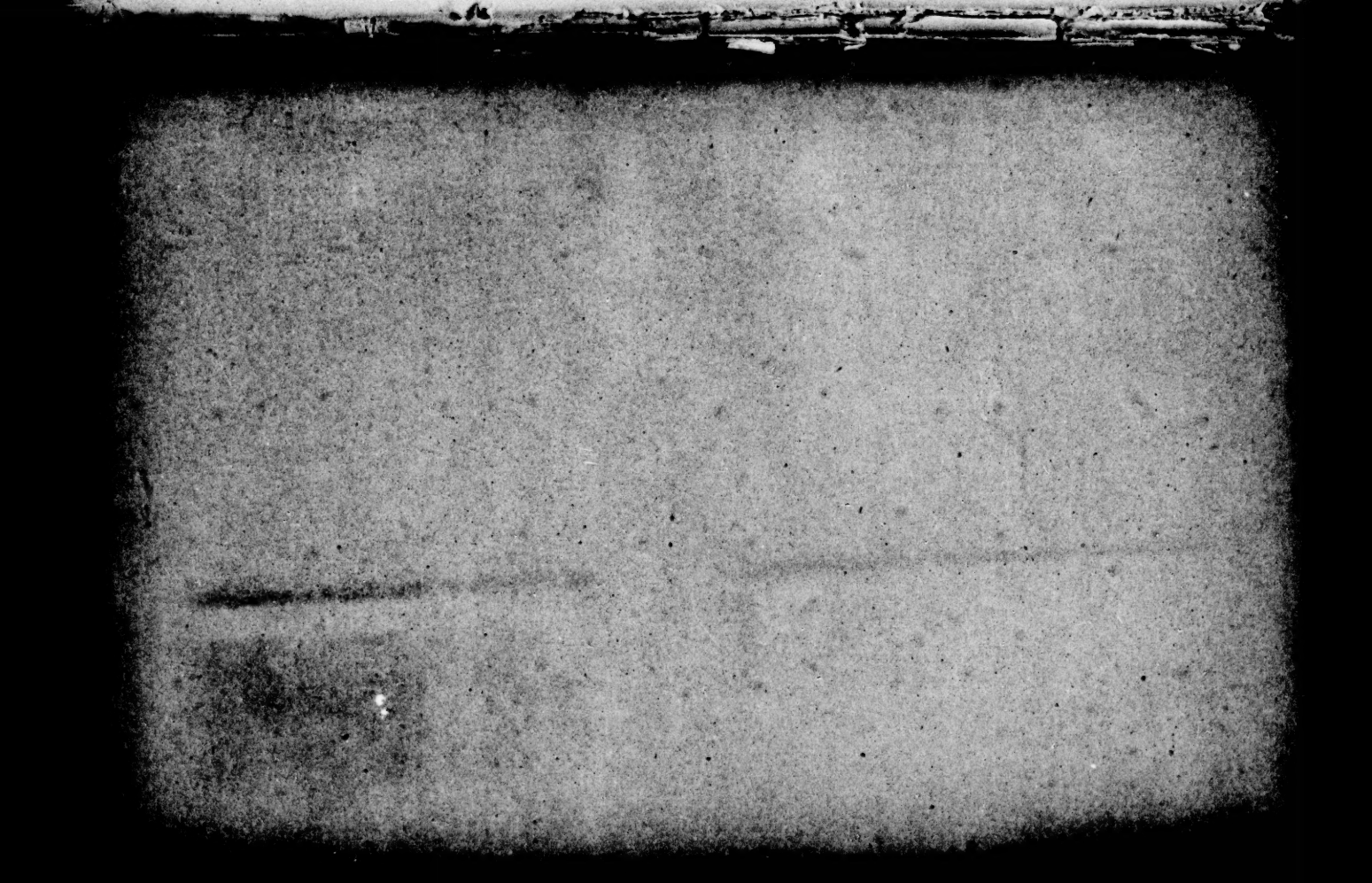
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 15, 1887.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1890.

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1 In the Court of Claims.

WARD MCALLISTER, JR.,
vs.
THE UNITED STATES. } No. 15288.

I.—*Petition. Filed September* 17, 1886.

To the Chief Justice and judges of the Court of Claims:

The petition of Ward McAllister, Jr., respectfully represents that he is a citizen of the United States, and that on the 5th day of July, 1884, he was appointed, and with the advice and consent of the Senate, United States district judge for the district of Alaska and received a commission from the President of the United States, a copy of which is hereto annexed, marked Exhibit A.

Thereupon he took the oath of office and entered upon its duties. He further sets forth that on the 28th August, 1885, he received a notice from the President of the United States purporting to suspend him from said office under section 1768, Revised Statutes, a copy of which is hereto annexed and marked Exhibit B.

He further represents that he has been paid the salary of said United States district judgeship up to and including August 28th, 1885, but the accounting officers of the Treasury Depart-
2 ment have refused to pay him any of said salary since that date.

Wherefore he claims as due him for said salary from the 29th of August, 1885, to the 6th day of September, 1886, the sum of three thousand and seventy dollars.

Your petitioner further sets forth that no action has ever been had upon this claim or any item thereof by Congress or by any of the Departments except as above set forth; that no other person is owner of said claim or has any interest therein; that no assignment or transfer of said claim or any part thereof or interest therein has been made; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; that he is justly entitled to the sum of three thousand and seventy dollars, after allowing all just credits and offsets, and he believes the facts hereinbefore set forth are true.

WARD MCALLISTER, JR.

JOSEPH K. McCAMMON,
JOHN S. BLAIR,
Attorneys, 1420 *F St., Washington, D. C.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Before me, Southard Hoffman, clerk United States district court for the northern district of California, personally came Ward Mc-

Allister, Jr., who, being by me duly sworn, says that the foregoing petition is true to the best of his knowledge and belief.

——— ———.

Sworn to and subscribed before me this 7th day of September, 1886.

[SEAL.] SOUTHARD HOFFMAN,
Clerk U. S. District Court, No. Dist. Cal.

3 EXHIBIT "A."

Chester A. Arthur, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, reposing special trust and confidence in the wisdom, uprightness, and learning of Ward McAllister, Jr., of California, I have nominated and, by and with the advice and consent of the Senate, do appoint him to be United States district judge for the district of Alaska, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same — right appertaining, unto him, the said Ward McAllister, Jr., for the term of four years from the day of the date hereof, and until his successor shall be appointed and qualified, subject to the conditions prescribed by law.

In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the fifth day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth.

CHESTER A. ARTHUR.

By the President:
FRED'K T. FRELINGHUYSEN,
Secretary of State.

EXHIBIT "B."

EXECUTIVE MANSION,
WASHINGTON, D. C., *July* 21, 1885.

SIR: You are hereby suspended from the office of district judge for the district of Alaska in accordance with the terms of section 1768, Revised Statutes of the United States, and subject to all provisions of law applicable thereto.

GROVER CLEVELAND.

To Hon. Ward McAllister, Jr., district judge for the district of Alaska, Sitka, Alaska.

4 II.—*Argument and Submission of Case.*

At a Court of Claims held in the city of Washington on the 25th day of May, A. D. 1887, this case was argued by Mr. Blair, for the claimant, and Mr. Assistant Attorney General Howard, for the defendants, and submitted.

5 III.—*Findings of Fact and Conclusion of Law. Filed May* 31, 1887.

This case having been heard by the Court of Claims the court, upon the evidence, find the facts to be as follows:

I.

The claimant received a commission as follows:

Chester A. Arthur, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, reposing special trust and confidence in the wisdom, uprightness, and learning of Ward McAllister, Jr., of California, I have nominated and, by and with the advice and consent of the Senate, do appoint him to be United States district judge for the district of Alaska, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Ward McAllister, Jr., for the term of four years from the day of the date hereof, and until his successor shall be appointed and qualified, subject to the conditions prescribed by law.

In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the fifth day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth.

[L. S.] CHESTER A. ARTHUR.

By the President:
FRED'K T. FRELINGHUYSEN,
Secretary of State.

And took an oath of office as follows:

United States District Court, District of California.

I, Ward McAllister, Jr., of California, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as United States district judge for the district of Alaska according to the best

of my abilities and understanding, agreeably to the Constitution and laws of the United States, so help me God.

WARD McALLISTER, JR.

Subscribed and sworn to before me this twenty-third day of August, A. D. 1884.

[SEAL.] OGDEN HOFFMAN,
U. S. Dist. Judge for California.

II.

The President took the following action:

Grover Cleveland, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, by virtue of the authority conferred upon the President by section 1768 of the Revised Statutes of the United States, I do hereby suspend Ward McAllister, Jr., of Alaska, from the office of United States district judge for the district of Alaska until the end of the next session of the Senate, and I hereby designate
6 Edward J. Dawne, of Oregon, to perform the duties of such suspended officer in the mean time, he being a suitable person thereof, subject to all provisions of law applicable thereto.

In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-first day of July, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and tenth.

[L. S.] GROVER CLEVELAND.

By the President:
T. F BAYARD,
Secretary of State.

Edward J. Dawne, therein mentioned, took the following oath of office:

DISTRICT OF OREGON, *ss:*

I, Edward J. Dawne, do solemnly swear that I will faithfully execute the duties of United States district judge for the district of Alaska, and that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully discharge and perform all the duties incumbent on me as said district judge according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States, so help me God.

EDWARD J. DAWNE.

Subscribed and sworn to before me this August 20, 1885.

[SEAL.] MATTHEW P. DEADY,
U. S. District Judge, Oregon.

III.

The President took the following action:

Grover Cleveland, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, by virtue of the authority conferred upon the President by section 1768 of the Revised Statutes of the United States, I do hereby suspend Edward J. Dawne, of Alaska, from the office of United States judge for the district of Alaska until the end of the next session of the Senate, and I hereby designate Lafayette Dawson, of Missouri, to perform the duties of such suspended officer in the mean time, he being a suitable person therefor, subject to all provisions of law applicable thereto.

In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the third day of December, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and tenth.

[L. S.] GROVER CLEVELAND.

By the President:

T. F. BAYARD,
Secretary of State.

And Lafayette Dawson, therein mentioned, took the following oath of office:

WESTERN DISTRICT OF MISSOURI, *sct:*

I, Lafayette Dawson, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as United States judge for the district of Alaska according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States, so help me God.

LAFAYETTE DAWSON.

Subscribed and sworn to before me, a deputy clerk of the circuit court of the United States for the western district of Missouri, having charge of the office and custody of the seal thereof, in the western division of said district, at Kansas City therein, this sixteenth day of December, A. D. eighteen hundred and eighty-five.

[SEAL.] WARREN WATSON,
Deputy Clerk.

7 IV.

The President issued the following commission:

Grover Cleveland, President of the United States of America, to all who shall see these presents, Greeting:

Know ye that, reposing special trust and confidence in the wisdom, uprightness, and learning of Lafayette Dawson, of Missouri, I have nominated and, by and with the advice and consent of the Senate, do appoint him to be United States judge for the district of Alaska, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said Lafayette Dawson, for the term of four years from the day of the date hereof, and until his successor shall be appointed and qualified, subjected to the conditions prescribed by law.

In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the second day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and eleventh.

[L. S.] GROVER CLEVELAND.

By the President:
T. F. BAYARD,
Secretary of State.

And Lafayette Dawson, therein mentioned, took the following oath of office:

UNITED STATES OF AMERICA, *District of Alaska, Sitka,* } ss:

I, Lafayette Dawson, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as district judge of the United States for the district of Alaska according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States, so help me God.

LAFAYETTE DAWSON.

Sworn to and subscribed before me this third day of September, 1886.

[SEAL.] ANDREW T. LEWIS,
Clerk of District Court of the United States for the District of Alaska, under Act of Congress May 17, 1884.

V.

Claimant received the salary of United States district judge for the district of Alaska up to and including August 28, 1885.

VI.

Claimant without resistance vacated the office of United States district judge for the district of Alaska on the 28th day of August, 1885, and subsequently thereto has not performed any of the duties nor exercised any of the functions of said office.

VII.

From and after the 28th day of August, 1885, the duties and powers of United States district judge for the district of Alaska were performed first by Edward J. Dawne and afterwards by Lafayette Dawson, and the salary attached to said office has not been paid to claimant since August 28th, 1885. The salary appropriated
8 for the judge of the district of Alaska for the period between August 29, 1885, and March 12, 1886, inclusive, has not been paid to any one, but remains in the Treasury to the credit of the proper appropriation. Mr. Dawson has received his compensation since the latter date, except for the period between August 6, 1886, and September 2, 1886, the salary for which has not been paid to any one, but remains in the Treasury to the credit of the proper appropriation.

VIII.

Claimant has not instituted proceedings of any kind or character other than this action to determine his right or title to the office of United States district judge for the district of Alaska since August 28, 1885.

Conclusion of Law.

Upon the foregoing facts the court find, as conclusion of law, that the petition be dismissed.

9 IV.—*Opinion of the Court.*

DAVIS, *J.*, delivered the opinion of the court:

Claimant was appointed judge of the district of Alaska, took the oath of office and entered upon his duties; later he was suspended by the President and another person was designated to perform the duties of the office, who in his turn, and before the meeting of the Senate, was also suspended and a third person was designated, who in due course was confirmed and commissioned in claimant's place. The political status of Alaska is peculiar in its nature, the district being without a legislature or government other than that prescribed in the act appearing on the 24th page of the 23d volume of the Statutes at Large.

We have already decided (in Howard's case, *supra*, p. —) that a judge of a territorial court is not a judge of a United States court within the meaning of the third article of the Constitution, but is a civil officer, whose office exists by virtue of the constitutional provision empowering Congress "to make all needful rules and regula-

tions respecting the territory" belonging to the United States, and therefore the incumbent of the office is subject to the will of the National Legislature, and his tenure and pay are governed by statute law as it may exist or be amended.

The district judge of Alaska has no different legal rights than has a judge of a Territory. Alaska is called a "district" and Arizona a "Territory," but over both have the Congress jurisdiction by virtue of the same constitutional provision. The peculiar circumstances which exist as to Alaska required legislation for its government somewhat different from that provided for the Territories, but nothing is found in the organic act tending to show on the part of Congress an intention or a desire to give the judge to be there appointed any rights superior to those possessed by other judges holding office by virtue of statutes authorized by section 3 of the fourth article of the Constitution. The act creates a civil and judicial district; it creates a district court having the civil and criminal jurisdiction of district courts of the United States, exercising the jurisdiction of circuit courts, and having also such other jurisdiction not inconsistent with the act as may be established by law. The judge was to be appointed for the term of four years, "and until his successor is appointed and qualified."

The jurisdiction of district courts in Washington Territory was the same as that vested in the circuit and district courts of the United States. (10 Stat. L., 176.) In New Mexico "the Constitution and all laws of the United States which are not locally inapplicable have the same force and effect as elsewhere in the United States" (9 Stat. L., 452), and the district courts in the Territory have the same jurisdiction in cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. (*Ibid.*, 450.) The same jurisdiction was given the courts of Utah (*ibid.*, 456), of Colorado (12 Stat. L., 175), Dakota (*ibid.*, 242), Idaho (*ibid.*, 812), Montana (13 Stat. L., 89), and Wyoming (15 Stat. L., 181). The tenure of the judges in the Territories is fixed "at four years and until their successors are appointed and qualified" (Rev. Stat., § 1864), being the same as that of the judge in Alaska.

It will be seen that in so far as judicial power is concerned the provisions of the organic act relating to the district of Alaska do not vary in principle from the laws of the United States governing the Territories.

The case must follow the decision in that of Howard, and the petition is dismissed.

10 V.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 31st day of May, 1887, judgment in the aforesaid case was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Ward McAllister, be dismissed.

11 VI.—*Application of Claimant for and Allowance of Appeal.*

WARD MCALLISTER, Jr.,
vs.
THE UNITED STATES. } 15288.

From the judgment rendered in this cause on the 31st day of May, 1887, I hereby appeal to the Supreme Court of the United States.

JOSEPH K. McCAMMON,
Attorney for Claimant.

Filed July 23, 1887.

AT CHAMBERS.

Filed and allowed in vacation, July 23, 1887.

WILLIAM A. RICHARDSON,
Chief Justice.

12 In the Court of Claims.

WARD MCALLISTER, Jr.,
v.
THE UNITED STATES. }

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of claimant for and the allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims, at Washington city, this 14 day of September, A. D. 1887.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Court of Claims. No. 238. Ward McAllister, Jr., appellant, *vs.* The United States. Filed October 15, 1887.

Office Supreme Court U. S.
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JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

WARD McALLISTER, Jr.,
vs.
THE UNITED STATES. } No. 238.

Brief for Appellant.

JOHN S. BLAIR,
JOSEPH K. McCAMMON,
Attorneys for Appellant.

JOHN H. WHEELER, Law Printer, Cor. 9th & G Sts., Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

WARD McALLISTER, JR.,
vs.
THE UNITED STATES. } No. 238.

BRIEF FOR APPELLANT.

After nomination to and confirmation by the Senate, Ward McAllister, Jr., received a commission as "United States district judge for the district of Alaska," dated July 5, 1884, took the oath of office, and entered upon his duties. On the 21st of July, 1885, the President appointed Edward J. Dawne to be judge in place of claimant, whom he that day suspended. Dawne, having taken the oath of office, was removed December 3, 1885, and Lafayette Dawson was appointed, and took the oath of office. The President nominated Dawson at the ensuing session of the Senate, and after due confirmation appointed him August 2, 1886, for four years, and September 3, 1886, Dawson again took the oath of office.

The appellant ceased to receive the salary of the office after August 28, 1885, and in this suit claims it up to September 6, 1886, contending that, notwithstanding the foregoing facts, he is, in the language of his commission, entitled

"to have and to hold the said office, with all the powers, privileges, and emoluments," "for the period of four years from July 5, 1884, and until his successor shall be appointed and qualified."

As an alternative proposition he claims that his right to perform the duties and receive the emoluments continued until September 3, 1886, when his successor became qualified, which, if correct, leaves due him $3,041.09.

As another alternative he claims the salary from the first day after the end of the session of the Senate, August 7, 1886, to September 3, 1886, when his successor was qualified, which amounts to $221.91.

ARGUMENT.

The act of May 17, 1884 (23 St., 24), fixes the term of the district judgeship of Alaska at four years. The President in appointing him to office for that period was not exercising his constitutional power of appointment, but one expressly conferred upon him by statute. The express grant in section 9 (23 Stat., 27) indicates that Congress did not regard the general power of appointing "all other officers of the United States" by and with the advice and consent of the Senate, conferred by section 2, article 11, of the Constitution, as extending to offices created by that act. And in this was recognized the oft-repeated decision of the Supreme Court that the power to make needful rules and regulations respecting the territory or other property of the United States was plenary, was without reservation, and that the needfulness of the regulations was to be passed upon only by the law-makers.

This distinction was recognized by the First Congress, for at the same session at which the famous act of July 27, 1789, was passed, Congress made EXPRESS provision authorizing the appointment of officers of the territory organized under the ordinance of 1787 by and with the advice and consent of the

Senate, and also *expressly* authorizing their removal by the President alone. (Act of August 7, 1789, 1 St., 52.)

The President deriving his appointing power from the statute, as in the case of Perkins (116 U. S., 483,) it was competent for Congress to fix the term of office, and having made no provision for removal or suspension, claimant was not subject to removal even by the President and Senate combined. (*Ex parte* Hennen, 13 Pet., 359.)

In Marbury *v.* Madison, 1 Cranch, 153, the Chief Justice held that Marbury having been nominated, confirmed, and appointed under a statute fixing his term of office for five years, he was entitled to hold his office for that time, and the gist of that part of the opinion is that the President could not, by withholding the commission, accomplish by indirection what he could not do directly, to wit, the removal of Marbury without the consent of the Senate. The act providing for the justices of the peace in the District of Columbia rests on a different clause of the Constitution than the one providing for a judge in Alaska, but the power in the latter case being broader and fuller, the reasoning applies *a fortiori* to the right of Congress to fix his term of office.

But is section 1768, Rev. Stat., *in pari materia* with the act of May 17, 1884, and is the fixation in the later act subject to the provisions of the former?

In the case of Blake (103 U. S., 227) the Supreme Court, in deciding whether a literal interpretation should be given to a statute relating to dismissal of officers from the military or naval service, resorted to a history of the facts which seemed to Congress to furnish the occasion and necessity for its passage.

Mr. Justice Harlan, in delivering the opinion, says:

"That section originated in the Senate as an amendment of the army appropriation bill which had previously passed the House of Representatives. (Cong. Globe; 39th Cong., pp. 3254, 3405, 3575, 3589.)

"It is supposed to have been suggested by the serious differences existing or which were apprehended between the legislative and executive branches of the Government in reference to the enforcement in the States lately in rebellion of the reconstruction acts in Congress. Most, if not all, of the senior officers of the army enjoyed, as we may know from the public history of that period, the confidence of the political organization then controlling the legislative branch of the Government.

"It is believed that within the limits of the authority conferred by statute they would carry out the policy of Congress as indicated in the reconstruction acts and suppress all attempts to treat them as unconstitutional and void or overthrow them by force. Hence, by way of preparation for the conflict then apprehended between the executive and legislative departments as to the enforcement of those acts, Congress, by the 5th section of the act of July 13, 1866, repealed not only the 17th section of the act of July 17, 1862, but also the resolution of April 4, 1862, which authorized the President, whenever military operations required the presence of two or more officers of the same grade in the same field or department, to assign the command without regard to seniority of rank. In furtherance, as we suppose, of the objects of that legislation was the 2d section of the army appropriation act of March 2, 1867, establishing the headquarters of the General of the Army at Washington, requiring all orders and instructions relating to military operations issued by the President or Secretary of War to be issued through that officer, and, in case of his inability, through the next in rank, and declaring that the general of the army 'shall not be removed, suspended, or relieved from command or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate, and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void, and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office,'" etc. (14 Stat. at Large, 486).

The history of that section is also part of the history of the act of March 2, 1867.

In July, 1866, three members of the Cabinet resigned. The political campaign of the summer and fall was vigorously waged on both sides over the methods of reconstruction and the adoption of the proposed Fourteenth Amendment. By an overwhelming vote the country decided against the President, and immediately upon the assembling of Congress in December a special committee reported the President to have been responsible for the New Orleans riots in July. The same day the bill to regulate the civil tenure, which subsequently became the act of March 2, 1867, was introduced. While the latter bill was pending ten Southern States rejected the proposed amendment, and the session was consumed in acrimonious controversies between the President on the one side and the two houses on the other. The bill passed the Senate with an exception excluding from the operations of the first section the heads of departments; the House amended by striking out the exception and inserting a proviso, which amendment was concurred in by the Senate The bill was vetoed, and passed by both houses over the veto. So far as reference to the debates of both houses is permitted it will show that the one thought in the mind of Congress was the curtailment of a power asserted by the President to have been conferred upon him by the Constitution; that was the sole purpose; and if the act of March 2, 1867, be unconstitutional—a question this Court is not called upon to solve—the act may be regarded as an expression of the opinion of the Thirty-Ninth Congress on a great constitutional question, just as the act of 1789 has always been treated as the opinion of the First Congress. The veto message contained nothing but the assertion of the President's constitutional right and his arguments to sustain it, and, it may be added, that the great impeachment trial consequent upon the violation of that statute was a forum in which this constitutional question came to be the sole issue.

Between the passage of the act of March 2, 1867, and its amendment in 1869, the Territory of Wyoming was organized, and, as proof that the Fortieth Congress did not deem the act of 1867 applicable to territorial offices, we find the act of July 25, 1868 (15 Stat., 178) in sections 2, 3, 9, 10, providing expressly that the governor, secretary, attorneys, judges and marshal of Wyoming should hold their offices for four years unless sooner removed by the President by and with the advice and consent of the Senate.

If the acts of March 2, 1867, July 25, 1868, April 5, 1869, and May 17, 1884, be considered together they establish that Congress having fixed the term of office of the officers at Alaska at 4 years, and conferred no authority either upon the President alone or upon the President in conjunction with the Senate to remove, and Judge McAllister having been appointed by a purely statutory authority to an office created by statute, holds the office for the term fixed by the statute and is entitled to the compensation so fixed, and that the words in section 1768, Revised Statutes, "the President is authorized to suspend any civil officer appointed by and with the advice and consent of the Senate" were used solely in reference to the constitutional exercise of the power of appointment and removal, and although general enough in the letter to include the claimant, were not so intended.

II.

If the language of section 1768 is to be held broad enough to include officers appointed by statutory authority as well as constitutional officers the exception in that section is equally broad. If the enactment of that section deals with officers, whether constitutional or otherwise, the exception, all other things being equal, should include not only United States courts existing under the Constitution, but also

those created by organic acts. It has uniformly been held by the Supreme Court that the courts organized by the legislatures of the Territories aud those created in the Territories by the organic acts of Congress are not United States courts in the constitutional sense. We do not contend that they are, but we insist that a court created by an act of Congress, the judge of which is appointed by the President, his tenure fixed by Congress, authorized to try offences in violation of the statutes of the United States, to entertain suits wherein the United States are plaintiffs, whose judge receives his salary from the Treasury of the United States, whose judgments are subject to review by the Supreme Court, and whose convictions are subject to the pardoning power of the President, is a court of the United States, and keeping in view the general scope of section 1768, contended for by the Attorney General, is within the exception.

It is not a United States court in the constitutional sense, but was one in the sense that Congress could legislate as to the salary and tenure of its judge, and could reserve him from the operation of general words which would otherwise include him.

If this court of Alaska was clothed with less judicial power than the constitutional courts the term "United States" might be inapt. But the additional power to try cases between citizens of the same State, the amplification of jurisdiction, does not detract from its claim to be so called.

The first consideration of the status of courts within the Territories was in the case of the American Insurance Company *vs.* Canter (1 Peters, 511).

Congress, in organizing the Territory of Florida, by the 5th section of the act of 1823, created a Territorial legislature, and that legislature erected a court which condemned certain cotton for salvage. Canter purchased the cotton at the sale consequent upon that judgment, and the whole question before the Supreme Court was the legality of the

salvage court instituted by the legislature of the Territory of Florida.

It was contended that Congress in its organic act had vested in the superior Court established by itself the power with which the legislature sought to invest the court of its creation. But the Court held that if there was such a grant to the superior court it was not exclusive, and therefore the jurisdiction of the territorial court might be concurrent.

It was also held that the whole of admiralty and maritime jurisdiction need not be vested in the courts established by Congress, and that the superior court of Florida, not having been created under the judiciary clause of the Constitution, was incapable of receiving any of the judicial power spoken of in the Constitution.

In the next case, Hunt *vs.* Palao (4 Howard, 589), the Supreme Court held that the territorial court of appeals of the Territory of Florida constituted by Congress had been a "United States court," and its records were not proper subjects of legislation for the newly-admitted State of Florida.

In Benner *vs.* Porter (9 Howard, 235) this view was affirmed and stated with a little more fullness. "The Territorial courts," says Mr. Nelson, J., "were the courts of the General Government"—meaning those established by act of Congress, and not the petty courts established as was the one under consideration in Insurance Co. *vs.* Canter by the territorial legislature.

In Clinton *vs.* Englebrecht (13 Wall., 434) it was held that the regulations of the judiciary act of 1789 were framed with reference to the States, and could not, without violence to rules of construction, apply to the territories; that is to say, that Congress in the act of 1789 did not by "courts and marshals of the United States" mean courts in the Territories, for the jurors, by section 29 of that act, were to be designated by lot or otherwise, according to the method practiced in each State, and the jurors were to have the same qualifica-

tions as required by the laws of the State to serve in highest courts of law of such State.

In Good *vs.* Martin (95 U. S., 90) it was held that the right of parties in interest to testify was controlled by territorial legislation and not by section 858, Revised Statutes (act of July 2, 1864, 13 St., 351), which provides: "That in the courts of the United States there shall be no exclusions," &c.

In Reynolds *vs.* The United States (98 U. S., 145) the question was whether United States or territorial legislation controlled in the number of jurors on a grand jury in Utah, and Clinton *vs.* Engelbrecht was reaffirmed.

In Hornbuckle *vs.* Toombs (18 Wall., 648) it was held that the practice, pleadings, and forms and modes were intended to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves; also the jurisdictions, subject, of course, to the organic act.

Miles *vs.* The United States (103 U. S., 304) reasserts the doctrine of Clinton *vs.* Engelbrecht and Reynolds *vs.* The United States.

In United States *vs.* Fisher (109 U. S., 143) it was held that Congress had the constitutional power to reduce the salary of the judge in Wyoming.

Now, while these decisions are uniform to the effect that courts within the Territories, whether created directly by Congress or by a legislature thereunto authorized by Congress, are not the "inferior courts" which by the Constitution Congress is authorized to establish, it is clear that the organic act in each case transfers to the local legislature more or less power of regulation, of practice, jurisdiction, &c., but at the same time reserves to Congress certain legislative power in the way of compensating the judges from the public treasury, fixing their tenure of office, diminishing or increasing their number, and providing for the disposition of their records. It is apparent that a court created by Con-

gress enforcing its laws may be a court of the United States, without being a constitutional one, and that within the domain which by the organic acts has been relegated to the legislatures, general legislation concerning courts of the United States would not apply to them, while legislation within the reserved powers would include them as well as the constitutional courts. The nature of the legislation and the standpoint from which it is taken would determine the sense in which the words "United States courts," "or courts of the United States," were used.

If it be assumed that Congress meant in section 1768 to include territorial officers in the power of suspension there are sufficient reasons which might have influenced Congress in excepting judges of the courts within the Territories from suspension and removal during their term of office.

These cannot be stated better than in the language of Mr. Justice McLean in his dissenting opinion in the case of the United States *vs.* Guthrie, 17 Howard, 284, 308, 310–312.

Congress may also have had in consideration the act of December 18, 1812, 2 Stat., 788, which makes it a misdemeanor for every judge appointed under the authority of the United States to practice law.

Still further, if to each and every word in a statute is to be given some meaning, some force to be given it possible, and not to impute to Congress the doing of a vain and foolish thing, the "judges of the courts of the United States" in section 1768, Revised Statutes, were not those whose courts were established under the judicial clause of the Constitution, for they were already abundantly protected by the Constitution itself.

In conclusion, it is contended that if "the courts of the United States" in section 1768 is to be limited to those created under the Constitution, then, by a parity of reason,

the words "any civil officer appointed by the President by and with the advice and consent of the Senate" in the same section means any officer so appointed by the President in the exercise of his constitutional powers. One spirit must have animated the whole section.

So far this case has been argued without reference to the peculiar circumstances of Judge McAllister's case.

In Alaska there is no local legislature, and whether the courts in the other Territories are courts of the United States or not it seems very clear that his is.

In Clinton *vs.* Engelbrecht, the Chief Justice says:

"The organic act authorized the appointment of an attorney and a marshal for the Territory, who may properly enough be called the attorney and marshal of the United States for the Territory, for their duties in the courts have exclusive relation to cases arising under the laws and Constitution of the United States."

Judge Dawson's commission expired by its own limitation the day the Senate adjourned. Judge McAllister's commission was to continue until his successor shall be appointed and qualified. During the interval between the adjournment of the Senate and the 3d September, 1886, claimant's commission was in full force, even if the Presidential suspension under section 1768 was legal and if the appointment of Dawson with the consent of the Senate wrought the removal of claimant.

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Office Supreme Court U.S.
FILED
MAR 23 1891
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

FALL TERM, 1890.

No. 238.

WARD McALLISTER, JR., *vs.* THE UNITED STATES.

BRIEF FOR THE APPELLANT.

PHILLIPS & McKENNEY,
Of Counsel for the Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Supreme Court of the United States.

FALL TERM, 1890.

No. 238.

WARD McALLISTER, JR., *vs.* THE UNITED STATES.

BRIEF FOR THE APPELLANT.

This is an appeal from a judgment of the Court of Claims dismissing a petition by the appellant, claiming salary as "United States district judge for the district of Alaska" for the period during which he had been *suspended* therefrom by the President, under section 1768 of the Revised Statutes.

The record is so short that no quotation or citation herein of its matter is deemed important.

The appellant contends that he did not hold his office of Territorial judge *at the pleasure of the President*, and, waiving all *practical* question as to the effect of the nomination and confirmation as above of his successor, denies that his *suspension* as above was valid.

The case will be argued here as presenting, directly or otherwise, the following important questions:

1. Can the President at pleasure *remove* judges of district or supreme courts in the Territories?

2. If he may, does the statute empower him to *suspend* them?

3. In case he may suspend them, are they not, at all events, *entitled to receive the regular official salary until they die, resign, are removed, or their term expires?*

The constitutional and statutory provisions which bear upon these questions are as follows:

Const., Art. III, Sec. 1:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Rev. Stat.:

"SECTION 1864. The supreme court of every Territory shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and they shall hold their offices for four years, and until their successors are appointed and qualified. They shall hold a term annually at the seat of government of the Territory for which they are respectively appointed."

"SECTION 1868. The supreme court and the district courts, respectively, of every Territory shall possess chancery as well as common-law jurisdiction."

"SECTION 1869. Writs of error, bills of exception, and appeals shall be allowed, in all cases, from the final decisions of the district courts to the supreme court of all the Territories, respectively, under such regulation as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in that court."

"SECTION 1879. The annual salary of the chief justice and associate justices of all the Territories now organized shall be three thousand dollars each."

"SECTION 1882. The salaries provided for in this title to be paid to the governor, secretary, chief justices and associate justices, district attorney, and marshal of the several Territories, shall be paid quarter yearly at the Treasury of the United States."

"SECTION 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere in the United States."

"SECTION 702. The final judgments and decrees of the supreme court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the supreme court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court. In the Territory of Washington the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the supreme court of said Territory in any cause [when] the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner."

"SECTION 1909. Writs of error and appeals from the final decisions of the supreme court of either of the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Montana, Idaho, and Wyoming shall be allowed to the Supreme Court

of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party or of other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decision of the supreme courts created by this title, or of any judge thereof, or of the district courts created by this title, or of any judge thereof, upon writs of *habeas corpus* involving the question of personal freedom."

"SECTION 1767. Every person holding any civil office, to which he has been or hereafter may be appointed by and with the advice and consent of the Senate and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he has been appointed, unless sooner removed by and with the advice and consent of the Senate or by the appointment, with the like advice and consent, of a successer in his place, except as herein otherwise provided."

"SECTION 1768. During any recess of the Senate the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed, in his discretion, by the designation of another, to perform the duties of such suspended officer in the meantime; and the person so designated shall take the oath and give the bond required by law to be taken and given by the suspended officer, and shall, during the time he performs the duties of such office, be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended. The President shall, within thirty days after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, nominate persons to fill all vacancies in office which existed at the meeting of the Senate, whether temporarily filled or not, and also in the case of all officers suspended; and, if the Senate during such

session shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable to the same session of the Senate for the office."

"SECTION 713. It shall not be lawful for any judge, appointed under the authority of the United States, to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of law. And any person offending against the prohibition of this section shall be deemed guilty of a misdemeanor."

The questions stated above will be discussed, *firstly*, upon the general principles supposed to be involved therein; and, *secondly*, in the light of numerous decisions by the Supreme Court of the United States which more or less concern them.

I.

1. *The President cannot at pleasure remove judges of the supreme courts or district courts in the Territories.*

That social force which is designated in the Constitution of the United States by the phrase *judicial power* is one whose specific quality is such that in time of peace it alone can make final determination of questions of *life, personal liberty*, and *private property*. This is a proposition almost absolutely true. The minute exceptions to it are of no importance here, and may be neglected. In the progress of political liberty this special power has been differentiated from the general power of society, and in the course of ages has gradually been fenced about by such maxims and such

institutions as have been thought to tend to produce the best results for those matters of first-rate importance—*themselves the* PRIMARY OBJECTS *of society*—which, as above stated, have been committed to its care. Wherever in a society the *lives, personal liberty*, and *private property* of citizens of the ordinary class (*i. e.*, not soldiers, &c., &c.) may *finally* be passed upon, *there* is the seat of its *judicial power*, and such passing on is a display of this power in action. It is of no importance for this proposition that such "action" may be carried by *appeal* to another tribunal of the same order. (*Langford's case*, 101 U. S., p. 344.) *Unless so appealed from* it is conclusive as to all matters within its jurisdiction; and *the whole force* of society will be exerted to make it good.

A Territory is a place, and its inhabitants are persons, within the ordinary *peace of the United States.* It is the seat of *homes* and of *the family;* and is *a nursery* of free institutions, according to the American pattern. Decisions in its courts upon life, personal liberty, and private property may be, and generally are, as *final*, within the above sense, as in any courts of justice within the United States. Its frame of government is indeed tutelary and temporary, but upon its change into a State the previous decisions of its courts upon the august topics above enumerated can undergo no revision, but stand forever.

Upon general principles therefore lying at the foundation of our institutions, this power in the Territories is entitled to all the guaranties of independence, accuracy, and purity that are proper for the same ends elsewhere within the political jurisdiction of the nation.

It is no answer to this proposition to say that the frame of government there is temporary, for we see that this particular action thereof is of permanent effect. The principle of public law that a transfer of political jurisdiction does not affect previous decisions upon private rights,

suggests that the illustration thereof in the case of a Territory forbids any conclusion from matters incidental to temporary functions of its government to incidents that are permanent.

The general principles in behalf of public liberty and private welfare in the Constitution of the United States are, by familiar axioms, to have such exceptions only as *necessity* demands, and these are not to go beyond the bounds of such necessity; in other words, it must always be borne in mind that those principles are *principles*, and those exceptions *exceptions only*.

An American TERRITORY has about it characteristics of higher order than those which mark a British *Colony*. The former is a fair prophecy of an American *State*, to be born after some brief period of gestation; whilst the future of the latter is as obscure as its present is anomalous. The two forms of government are alike in this—that *the judicial power of the principal Society to which each is attached pervades both*, and in both operates by like methods, with the same quality of action, and to the same ends. Nor could it be otherwise, inasmuch as that power is a function of SOVEREIGNTY only, and no other sovereign than Great Britain in the one case, and the United States in the other, can be conceived of as possessing it.

In the absence then of any *context* to show that a particular writer or speaker means something else in using the phrases "United States Courts," or "United States Judges," these must include such persons and things *in Territories*.

It will scarcely be questioned that American citizens within Territories have such *right to enjoy the general* guaranties of American liberty, as in all respects is quite equal to that of a British colonist to like guaranties under the

British constitution. This appears to be a very modest statement of this relation, but the present contention requires no more.

Now it is well known that those who laid the foundations of this Government made a solemn and public claim of right *as British colonists* to the guaranty which the British Constitution after a sharp struggle had secured (12 & 13 W., III, c. 2; *Act of Settlement,*) against the removability of judges at the pleasure of the Crown; and that this was one of the issues in behalf of which they threw down the gage of *their lives, their fortunes, and their sacred honor!* "*He has,*" *says* THE DECLARATION, "*made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.*" This is one of these "repeated injuries and usurpations" by the King of Great Britain, "having in direct object the establishment of an absolute tyranny over these States" in their colonial condition, which were "submitted to a candid world" as warranting the People of the United States in *abolishing* their then existing form of government. It is mentioned in the same breath as it were, and with the same emphasis as *Standing armies, Taxation without consent, Trial without jury, Trial beyond sea,* and *an Independent military.*

It is submitted in this connection, without more said, that the words above quoted from the Declaration of Independence forbid the employment by officers of the United States of logic that will allow a *judge*—that is, a person wielding *judicial power*, as above defined, under the United States,—to be dependent upon the will alone of the Chief Executive of the nation. Upon this point refinements may be thought to be even indecent. *The fundamental provision is quick and powerful, and admits of no limitation short of that which extends it wherever officers of the United States are engaged under the powers of that society in passing finally upon the ordinary objects of judicial power,*—THE LIFE, LIBERTY *and* PROPERTY *of the citizen.*

If the British colonists—Hancock, Adams, Franklin, and Jefferson—challenged this as their right, so as well may Territorial citizens of the United States at this day.

In this connection it is interesting to recall the fact that in March, 1775, [see also the protracted discussion of this topic a few days before by Dr. Franklin, then in London upon the eve of sailing for home, in despair of an adjustment: Works, [*Sparks*] Vol. 5, p. 2.] Mr. Burke, in his speech upon "Conciliation with America," after having dealt with the topic of *taxation*, proceeded as follows:

"Having guarded the principles of local *legislature*, I would next secure to the colonies a fair and unbiased *judicature;* for which purpose, sir, I propose the following resolution:

"'That from the time when the general assembly or general court of any colony or plantation in North America shall have appointed by act of assembly, and duly confirmed, a settled salary to the office of the Chief Justice and other judges of the superior court of such colony, it may be proper that the said Chief Justice and other judges of the superior courts of such colony shall hold his and their office and offices during their good behaviour, and shall not be removed therefrom, but when the said removal shall be adjudged by his Majesty in council, upon hearing, on complaint by the general assembly, or on a compliant from the governor or council, or the House of Representatives severally of the colony in which the said Chief Justice and other judges have exercised the said office.'"

Accordingly, at the conclusion of his speech he moved certain resolutions, including the above, and was met as Parliament at that time met all liberal and wise propositions for settling the impending conflict: to wit, by an adverse vote,—of 270 to 78: "a great majority!"

The incident, however, preserves a memory of how important, upon both sides of the ocean, was considered the principle now under discussion; and that Americans as-

serted, and philosophic English statesmen yielded, that the "good behaviour" tenure for judicial offices is not a mere technical thing, good for certain communities, and ill for others, but is an essential element in the peace and good order of all.

Mr. Burke did not end his good offices to Great Britain in this respect after receiving such a rebuff. In 1782, after the United States had gained their independence upon the footing of their *Declaration*, and when as a member of the *Rockingham* administration, he was engaged in giving effect by legislation to many wise economies which while in opposition he had suggested, he carried the act, 22d Geo. III, c. 75, (now known by his name,) which secured to British Colonies in America and the West Indies, very much in the terms of his resolutions of 1775, the boon of a judicial tenure of "good behavior." This provision, by the act of 54 Geo. III, c. 2, was afterwards extended to British colonies everywhere. It was, briefly, that it should be unlawful to grant any office in a colony for a term longer than while the appointee personally discharged its duties and behaved well therein; and that officers who misbehaved should be liable to amotion by the governor and council of the colony, with right of appeal to the King in council.

The expression "for a term *longer*," &c., means, of course, that whatever might be the duration of such office otherwise, *ex. gr.*, *for years* or *for life*, it should be subject to the conditions of *personal discharge of duties* and *good behavior*. The statute applies to all offices, executive as well as judicial, and, when read in the light of English history, especially of contemporaneous events, *reddendo singula singulis*, secures the latter *condition* to colonial offices of the latter description.

And so it has been administered and construed in English courts.

In *Willis* vs. *Gipps*, 5 Moore, P. C., 379, it was held that

any amotion of a colonial judge under the above statute must be preceded by *notice* to him, and *hearing*. That case came from *New South Wales* (1843), and it is stated in the report that the same judge had previously (1829) been amoved without notice from a like office in *Canada*, and that such previous amotion had in the same manner been held void. *Grenada* (Island) vs. *Sanderson*, 6 Moore, P. C., 38, and *Montague* vs. *Lieut. Gov., &c., of Van Dieman's Land*, *ibid*, 489, are also cases of amotions of colonial judges under *Burke's act* above, the proceedings in the latter case having at first contemplated only a *suspension*. See, also, as similar, Cloete's Case, from *Natal*, 8 Moore, P. C., 484.

In 6 Moore, P. C. (N. S.), Appendix, ix–xx, is to be found a "Memorandum of the Lords of the Council on the removal of Colonial Judges." This was made in April, 1870, and is said to be based upon observation and experience during thirty years. It is an interesting paper drawn up at the instance of Lord Granville as one of the Secretaries of State. As it extends to a consideration of what new legislation was desirable, as well as of the then state of the law, it partakes of the nature of a comment upon the British *Constitution* in that particular. What is observable in the present connection is that, serious as were thought to be the *delay* and other incidents in amotions of judges under the above statute, the exercise of a *removal* or a *suspension* "at pleasure" by the Crown seems not to have been once entertained.

It is instructive to consider that the case now before the Court raises a question, (one supposed also perhaps to be seriously inclined against the claimant,) whether the People which gave that solemn lesson to the mother country which so impressed Mr. Burke, and was so as above *improved* by the imperial *scholar*, did not *by their own Constitution intend* to

abandon the principle, except as a sort of technical thing incident to certain communities only; the whole force of the suggestion being seen in the suggestion that this supposed *abandonment*, although not made expressly, is to be *implied* from the *general temper* of that Constitution in regard to SUPERIOR COURTS OF RECORD in domestic communities then contemplated as in the future to occupy relations to that people not unlike, but certainly superior, to those which they themselves immediately before occupied towards Great Britain!

However, in the absence of any judicial decision, it may be allowable to deny that so precious a fruit of the Revolution has been *diverted* to the use of *Van Dieman's Land, Natal, and the rest of them!* in exclusion of *Arizona, Alaska*, and the *District of Columbia;* or, that if the struggle begun in 1776 had failed, the British Act of 1782 would have secured to the above *Territories*, under the denomination of *British Colonies*, a judiciary more independent of executive pleasure than that which the success of that struggle has actually bestowed!

If there were anything in the *Constitution* of the United States looking like a change of mind in the people upon the above matter, this, of course, would control the present topic, which is founded upon the *Declaration*. But there is not. Upon the other hand, if that Constitution were obscure in this respect, it is submitted that any ambiguous phrases thereabouts would be *flavored* by the Declaration; and the above principle enforced. But the language of the Constitution is, distinctly and more definitely, to the same effect. It provides that those officers who wield its judicial power shall hold office "during good behavior."

If, therefore, it were true that the protection given by Article III of the Constitution (above), to "*judges*" *who exercise* "*judicial power of the United States*" *in* "*inferior courts*," does

not extend to Territorial judges (a point which I propose to discuss with great deference,) yet it is very difficult to see how it can be that they are not within that of the principle so solemnly asserted, as above, in the Declaration of Independence. *In essence that claim of right was one for private persons against* GOVERNMENT *in general.* That the government against which it was in fact asserted, was a monarchy, and beyond the ocean, cuts no figure in its original *formal* assertion. This was a mere *circumstance.* Like the assertion of Rights, contained in the first amendments of the Constitution (*Cooley, Const.*, p. 257, bottom), this is *of the essence,* even as regards a limited and republican government; although it may not be improper to suggest again that, in the present instance, it is claimed for citizens living in *families* and *homes;* and in *the peace of the United States;* who at the same time, for good reasons, are not citizens qualified for taking part in the choice of a President. I found nothing material upon this suggestion. It is only such a *circumstance* as that which, as above, attended the *Declaration* in 1776. *The right of the private citizen to a judiciary independent of the pleasure of the Executive is irrespective of the form of government under which it may be asserted.*

The decisions and arguments in this COURT upon the form of expression in the Constitution will be examined further on. Suspending until then a consideration of the supposed tendency of these, it is now further submitted that that "form" does not require that a judge whose office is incident to a frame of government that is itself of necessity temporary shall have *a life office* in order to administer the "*judicial power of the United States!*"

For the expression "during good behavior" does not *per se* import *a life estate.* It does so only when joined to indefinite words of limitation. "During good behavior" are *per se*

only words of *condition subsequent*, and, like all such words, may be attached to estates of any definite duration whatever. (2 *Bl.*, 156, marg.)

Comyn (4, 61,) puts that doctrine thus: "So, a demise to another for a time indeterminate passes for life if livery be made, or of things which lie in grant, without livery; as a lease to a man *quamdiu se bene gesserit.*" For this he cites *Co. Litt.*, 42*a*, which is to the same effect, as is the case of *Harcourt* vs. *Fox*, (*Shower* 1, p. 506), which, with the above passage in Coke, is referred to by *Story*, *Const.*, *sec.* 1600, as bearing upon the judicial tenure: [however, without expressing his own opinion thereupon; as is the case also with *Kent* when considering this *Article:* 1st, 292, marg.]

It were idle to elaborate the position that an estate created at common law by livery of seizin without words of inheritance, created a life estate—an estate *for the life of the donee*, if the donor had so much, but if *he* were, for instance, tenant in tail, then only *for the life of the donor.*

Coke and *Comyn* are engaged at the places cited in showing this; and the point of *Coke's* expression is, that the words *quamdiu*, &c., make the life estate *otherwise created* (in *lands* by livery, and in *rents*, &c., by delivery of a deed) *determinable.*"

It is therefore the language *in context* with the *quamdiu*, &c., that along with *livery*, &c., makes the estate one for life. If that context had indicated a different estate, then the *quamdiu*, &c., would still have been apposite—that is, to make such other estate also "*determinable*" by an incident.

And to this effect was important political action here immediately preceding the adoption of the Constitution. By the ordinance of 1787 (*Hickey*, *Const.*, p. 193), the "temporary" government of the Northwest Territory was to be furnished with judges having commissions—otherwise indeterminate—

"to continue in force during good behavior." These commissions conferred, as it appears, a *quasi* life tenure—*i. e., if the "temporary" government should so long continue, conditioned also upon good behavior.* That *estate*, like the somewhat analogous one in English estates holden by *base* tenure, was substantially *at the will of the legislature* in regard to the government to which it was incident;—a *will* which in other cases afterwards, for sufficient reason, defined itself further by determining itself at periods from *four years to four years if the Territory should so long continue.*

If the Constitution of the United States must be held (as necessarily it must) to contemplate and to provide for *provisional* and *temporary* [Territorial] governments, as well as for such as should be *permanent;* it provides in the same way that the *context* (as above) which defines the *terms* of judicial office, (to which the phrase "during good behavior" is annexed,) shall, under some circumstances, be no less *temporary.* And that temporary character is no more incompatible with the "*good-behavior*" *condition subsequent*, than is a life estate.

In illustration of this view it is submitted that even the office of a Justice of this COURT of the United States *when created by a commission to fill a "vacancy,"* (Art. 2, sec. 2, clause 3), although it continue only to the end of the next session of the Senate, is during that period also affected by the condition of "good behavior," equally as under a permanent commission.

It is submitted that the President could not revoke such a commission at pleasure, and make a new appointment: ex. gr., suppose in the case of Chief Justice Rutledge.

So also as to commissions to fill vacancies upon the supreme bench of the District of Columbia. Although in this case the "good behavior" tenure is only *statutory*, and,

therefore, cannot interfere with any function for removal that is conferred upon the President by the Constitution.

Indeed, it seems that if the power of removal now in dispute be conferred upon the President directly by the Constitution (by virtue, say, of his duty to "see the laws faithfully executed": Art. 2, 3, 1: as Mr. Madison suggested,) he may thereunder at any time remove any judge who has a *merely statutory* tenure for *good behavior;* for such statutory tenure, read in context with the Executive function, would mean no more than "good behavior"—*in the discretion of the President!*

At the risk of being too *abundant* upon this topic, I add that in the State of Pennsylvania, (1873), the tenure of the judges of the Supreme Court is for 21 years; and in Indiana, (1851), for 6 years: upon express condition "if they so long behave themselves well"; and in Delaware, (1831), the same was made the tenure of certain executive officers who hold otherwise for 5 years.

From its very origin the Constitution contemplated a *permanent* political structure—"an indestructible union of indestructible States,"—and also *temporary* political structures, as being necessary to at least the earlier stages of this general *society.* For the former it provided judges with tenure *during good behavior,* the context (*permanency* of institutions to which these would belong) indicating a "determinable" *life* tenure; whilst the context derived from a *temporary character* in general structure in like manner indicated that the equally apposite *during good behavior* intended a "determinable" *temporary term of office,* the latter element being left to further definition in matters of detail by the legislature.

It is therefore submitted that an argument that the phrase "during good behavior" of itself expresses a life estate, may

have been drawn without sufficient consideration of the reasons and maxims of that system of law from which it comes, and that of itself the phrase means nothing, but that the term of office to which it is annexed, *whatever that may be*, is "determinable" only by ill conduct!

If, therefore, *a social force* can be exercised over citizens of the Territories through the medium of legislation by the United States which in substance does not differ in its purposes, modes, and ends, from the *judicial power of the United States*, and yet [as seems entirely inadmissible] NOT BE SUCH JUDICIAL POWER; nevertheless, that conclusion is one not necessitated by the circumstance that the officers who administer it hold office only for a term of years. By fundamental principles in this Society ANY TERM OF OFFICE *for such purposes becomes, ipso facto, a term* DURING GOOD BEHAVIOR!

Upon the whole, then, section 1864 of the Revised Statutes, above, gives to the judges therein mentioned terms for four years *during good behavior*, because of the context to it in the Constitution; the Declaration of Independence in the meantime also forbidding that they should be *at the pleasure of the Executive*. In other words "good behavior" as a positive element in judicial tenure of office, however such office may be otherwise limited, is one of "those fundamental limitations in favor of personal rights" to which Congress in all Territorial legislation is necessarily subject. Mormon Church Case, 136 U. S., 1, 44.

It is likewise submitted that the uniform and long-continued practice of this COURT, under express and repeated statutory provision to that effect, by which it is connected with Territorial courts through the regular forms of *appeal* and *writ of error*, is in direct contradiction of all suggestions that the latter are not within the system of *courts of the United*

States, or exercising *the judicial power of the United States*. It seems inconceivable that this COURT can take jurisdiction of questions not within the sphere of judicial power—*or even of those outside of that of the judicial power of the United States!* When pressed (*Ritchie's Case*, 17 How., 525, *Grisar* vs. *McDowell*, 6 Wall., *p.* 374) by a like objection in regard to "*appeals*" from the special statutory tribunal in California for deciding upon *Mexican titles* to the district courts of the United States, it recognized the validity of the objection, and obviated it by saying that although called "appeals" the new proceedings in question within the district courts of the United States were in reality *original* proceedings.

See also Ferreira's Case, 13 How., 40; Gordon's Case, 2 Wall., 561; 117 U. S., Appendix, and Jones' Case, 119 U. S., 477.

2. The President, at all events, cannot *suspend* judges of the Territorial courts, under section 1768 above.

In addition to what is said above, it is submitted that, even if a Territorial judge be ordinarily removable at the pleasure of the President, it is incompatible with the nature of the judicial office that those who hold it shall be *suspended* at Executive pleasure and restored again at like pleasure, off and on, for as many times as any President may choose—for this is what the words must mean for such officers as they include at all. That such a farce might be ended by voluntary resignation is of no consequence, as systematic compulsion ripening into the result of *voluntary* resignation, is a machinery not to be thought of.

Nor is it, as matter of course, of the slightest importance that a President of the United States in all probability *would not* exercise this power in such a way.

It is submitted, therefore, that the exception in Section 1768 in favor of "judges of courts of the United States" in the nature of things includes judges of Territorial courts.

It is true that several cases before the Supreme Court of the United States appear at first blush to have gone far to exclude Territorial courts from the class known as "courts of the United States." It is submitted however that these cases go upon special reasons; and that whenever an assertion of such a principle has been necessary to the judgment rendered and not merely a superabundant argument,—as doctrine it stands upon some *context* showing that, *ex. gr.*, the Legislature in using the phrase "courts of the United States" *intended* only such courts of the usual and permanent class.

And so has this court held in the recent well-considered case of *Page* vs. *Burnstine*, 102 U. S., 664.

This case depended upon the construction to be given to a rather complicated state of congressional legislation defining the competency of witnesses. Two statutes were passed on the second of July, 1864, the one affecting the competency of witnesses "in courts of the United States;" the other, "in any court of justice in the District of Columbia." The "competency" so created was, for present purposes, substantially the same in both. Upon the 3d of March, 1865, a statute was passed amending the former of the two acts aforesaid by making an exception to the competency thereby previously created. In 1871 another statute declared that "all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere." The question, thereupon, was whether the *exception* created by the act of 1865 applied within the District.

It was held that it did; and this as a matter of construction both before the act of 1871, and, *especially*, after.

It seems a matter of course that, if the phrase "courts of the United States" does not include courts of *Districts* and

Territories, a statute which limits its own application to such courts is, *ipso facto*, *locally inapplicable* within such places. Congress must be assumed thereby to have limited its application to courts *outside of* these: and a court of justice would not feel itself justified upon any notion of policy which it might entertain, to strike out such limitation. In such case the above act of 1871 would not help the matter. And so the COURT felt; and thereupon, in review of the train of reasoning upon which it had proceeded, it said, by MR. JUSTICE HARLAN (p. 668):

"These views do not conflict with the previous decisions of this Court, holding that certain provisions of the general statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground mainly that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the general statutes of the United States referred. It was therefore ruled that the territorial enactments regulating the practice and proceedings of territorial courts were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to 'courts of the United States.' Clinton *vs.* Engelbrecht, 13 Wall., 434; Hornbuckle *vs.* Toombs, 18 *Ib.*, 648; Good *vs.* Martin, 95 U. S., 90. No such state of facts exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us."

The circumstance that one member of the COURT (MR. JUSTICE BRADLEY), tersely *dissented*, indicated that the case was particularly well considered. That dissent does not concern the above principle, but is founded upon a conclusion that the legislation in question did contain that *context* which in the view of the other members of the court was wanting.

And words of THE CHIEF JUSTICE, at the present term, when deciding a preliminary question in the Sayward Case, may be quoted as being to the same general effect.

Page vs. *Burnstine*, therefore, places the question of the meaning of the general phrase, "courts of the United States" upon the reasonable ground that, *presumptively it includes courts of Territories, but such presumption may be rebutted by a suitable and plain context.*

The cases cited by this COURT in that connection are significant. These contain here and there some very general language to the effect that territorial courts are not "courts of the United States" within the meaning of that phrase in the Constitution. *Page* vs. *Burnstine* reminds their readers that the ancient maxims for construing language are applicable to that which these opinions contain: "*Verba accipienda sunt secundum subjectam materiem:*" "*Ex antecedentibus et consequentibus fit optima interpretatio.*"

To the cases so cited may be added, as of the same class, those of *Reynolds*, 98 U. S., 154, and *Miles*, 103 U. S., 304.

Other cases upon this general subject will be noticed in the sequel.

In the meantime it is submitted that Section 1768, *as well as the statutes from which it is derived, contains no* CONTEXT *to limit the meaning of the phrase in question; and therefore, as well as from the reason of the thing as above stated, that judges of the Territorial courts are excepted from the power which the President possesses of suspending civil officers of the United States.*

To omit nothing which this important case has suggested, I proceed farther to submit as above, that:

3. In case it be thought that the President may *suspend* judges of the Territorial courts, these officers are at all events entitled to receive the regular official salary until such suspension is terminated by death, resignation, removal, or efflux of term.

The argument for this is that during their suspension *they continue to hold office*, and may at any moment be restored to activity at the pleasure of the President. *Suspension*, as above hinted, is not intended to coerce *resignation*. It is not intended that judges in that situation shall by engaging in practice in cases before their court, unfit themselves for immediately obeying any order which restores them to the bench. They are therefore as well within the *policy* of Section 713 (above) as they are within its *words*. It follows that such words of Section 1768 as deprive suspended officers in general of compensation do not apply to judges. It is not intended that they shall be cut off from their ordinary pursuits in life without compensation!

Perhaps this suggestion may be thought rather to enforce the conclusion under the *second* topic above than to give ground for a *third*. Practically of course it makes no difference to the claimant if it shall so be taken, inasmuch as Section 713 makes a *context to enforce any presumption* that Territorial judges are judges of the courts of the United States within the exception contained in Section 1768.

This point is a simple one, and stands upon an obvious course of reasoning. It may therefore be left to this bare statement.

II.

In accordance with the plan first above laid out it remains to notice certain decisions by this COURT which more or less concern the present case.

Some of these have already been mentioned in connection with *Page* vs. *Burnstine.*

It is submitted that that case implies that if there should be anywhere in the reports cases which do not fall within the class cited and *distinguished* therein—cases which *without a context to that effect* hold that Territorial courts are not "courts of the United States" within the meaning of the Constitution—these are not hereafter to be followed. For there can be no reason in treating a *distinguo* of certain decisions as being conclusive to a particular end, so long as there are other valid decisions *outside of such distinction* which equally contradict that end. *Page* vs. *Burnstine holds the fort against all comers—some* by showing that they do not contradict, and *others* by significant silence! This course of treatment of cases that have *gone down the horizon* is supposed to be not uncommon. The whole profession may have recognized that these have been overruled long before a court *expressly* announces it. After due time ("due" to the stability of the law), when some lawyer ventures to cite the old case as if still authority, a court may pronounce that certain subsequent cases, in which the one cited was perhaps not even mentioned—have long since overruled it!

The celebrated case of *Insurance Co.* vs. *Canter*, 1 Pet., 511, may to some degree be in such condition.

There the organic act for Florida had given exclusive jurisdiction in "*all cases arising under the laws and Constitution of the United States* which," &c., to the superior courts

of that Territory; whilst the Territorial legislature had conferred "*admiralty*" jurisdiction upon a court composed of a notary and five jurors. This COURT (MARSHALL giving judgment) held that the latter jurisdiction was not included within the phrase which defined the former. The opinion is one which has been very generally cited and quoted ever since it was deliverd. Like some other cases in the early days of the COURT *Canter's* has been far more important for its speculations than for the decision. It may not be easy to say how much of the reasoning which it contains is still authoritative. That reasoning seems to be disparaged by the decision and opinion in the case of *The City of Panama*, 101 U. S., 453, where it was held that a statute which gave to a territorial court jurisdiction "in all cases arising under the Constitution and laws of the United States" did confer jurisdiction in *admiralty*, the opinion intimating that but little attention is due to "select passages" to the contrary quoted by counsel, perhaps abundantly, from *Canter's* case. Those "select passages," by being quoted again and again, as if themselves a part of the body of the Constitution, may have become responsible for much of the erroneous opinion current as regards the "judicial power of the United States," and "judges of the courts of the United States," under the Constitution. The fermentation which the opinions of MARSHALL are constantly undergoing from contact with perennial and most important public and private business and interests of this nation must necessarily, by degrees, separate from them all matter foreign to their essential quality;—such process to issue, in conclusion, by displaying, in what Mr. Burke might have called a "defecated and dephlegmated" condition, his transcendent services to the American public as CHIEF JUSTICE and SEER.

In *Benner* vs. *Porter*, 9 How., 235, a libel in admiralty for supplies, &c., had been filed in a Territorial court of Florida in 1846. Florida had been admitted as a State in 1845, but

insufficient provision was supposed to have been made by Congress for a *transfer* from the Territorial courts of such matters as were of *Federal* jurisdiction. A district court of the United States had been authorized indeed, but this had not been organized at the time of bringing the suit in question.

This COURT held that the above circumstances did not continue the former Territorial jurisdiction. In the opinion are to be found passages to the effect that Territorial courts are not "courts of the United States." If their generality be restrained to the subject-matter of the suit no fault can be found with them.

In *Hunt* vs. *Palao*, 4 How., 589, a judgment had been rendered in the court of appeals of the Territory of Florida, in the year 1844. After the *admission* of Florida its Legislature had ordered the records of the above court to be transferred into the custody of the clerk of the supreme court of the State. Thereupon a motion was made in this COURT for process to bring the above judgment up for review. This was refused upon the ground that this Territorial court was no longer in existence; that its records could not by mere act of the State Legislature be transferred to a State court.

Arguendo, TANEY, CHIEF JUSTICE, said (p. 590): "The territorial court of appeals was a court of the United States, and the control of its records therefore belongs to the General Government and not to the State authorities;" also once and again that the power exercised by the court that rendered the judgment was "judicial power."

These expressions like others to the contrary quoted above may be somewhat restrained by their subject-matter, but, considering who it was that used them, they may be thought to be a set off to those others. One of them is quoted in *Atherton* vs. *Fowler*, 91 U. S., 143.

In *Freeborn* vs. *Smith*, 2 Wall., 160, upon a question as to the transfer of a judgment from a Territorial court of Nevada into its State court, the opinion goes, as obviously was necessary, upon the ground that the power exercised in the former class of courts is identical with that exercised in the latter—that is, is *judicial power*.

It seems indeed plain that all statutes which, upon the *admission* of a Territory, transfer the records of its courts into State and Federal courts respectively, giving effect at the same time to judgments, interlocutory and final, already passed in the former, must assume that principle. And this is true also of the transfer in the same way of records from the provisional military courts allowed by public law in case of conquest (*Leitensdorfer* vs. *Webb*, 20 How., 176), in which courts is exercised an exceptional "judicial power" incident to *time of war*, and therefore excepted from the formal provisions for the exercise of the same power in times of peace. Such provisions, like other *leges,—inter arma silent.*

In *Guthrie's case*, 17 How., 284, *Goodrich*, once Chief Justice of Minnesota Territory, had been removed, at will, by the President before his term of office had expired. Some two years thereafter he applied for a *mandamus* against the Secretary of the Treasury requiring the latter to pay his salary. This was refused. There had been no *appropriation* to cover the claim, and Goodrich was *out of office* when he brought suit. *Four* members of this COURT denied the application upon the former ground; *four* others upon the latter, and *one* dissented.

The decision plainly has no bearing upon a suit like the present—brought against the United States itself in the Court of Claims. The absence of an *appropriation* and the circumstance that the applicant was *out of office* (his term continuing) seem equally fatal to a *mandamus*.

In *Fisher's Case*, 109 U. S., 143, the claimant had been chief justice of Wyoming from February, 1876, to November, 1879. By a statute in force at his appointment the salary was $3,000 per annum. Under an act passed whilst he was in office such salary was reduced to $2,600. The suit was for the difference. Inasmuch as the claimant had accepted such reduced salary "*in full compensation*" of his service, it appears that there was no need of resorting to general constitutional considerations in order to reject his claim.

It was said, however, that Fisher was not entitled to recover because, amongst other reasons, the salary of a Territorial judge is not protected by the Constitution; and for that *Clinton* vs. *Engelbrecht* (above) is cited.

As an original question it might possibly be doubted, whether, allowing that Congress has Territorial governments at its will (subject to the Constitution), in case it at any time determines that will by creating a judicial term for four years, it has power whilst such term continues intact, to *diminish* the *compensation* thereto annexed.

Nevertheless in Fisher's case it had done so *expressly;* and this COURT appears to have thought that, as the judicial term was for four years, *only if Congress should so will;* so also the salary was $3,000 determinable in the same way.

That decision does not affect the present case. The will of *the Legislature* over a Territory is a different thing from the will of *the President.* A Territory does not hold its existence at *his* will; and so no conclusions in favor of action by the Legislature within the general scope of such will, can be implied for similar action by the President. Whatever general *paternal* jurisdiction exists under the Constitution is *legislative* in its character, not *executive.* Mormon Church Case, 136 U. S., 1, 56. If it be true that, in the teeth of the *Declaration* above quoted, the Legislature might subject such judges to the pleasure of the Executive—at all events, it has

not yet expressly done so; and in the meantime all mere implications in favor of such subjection if such there can be seem to be met, and abundantly as has already been submitted, by that *Declaration*.

In arguing this case it has not been forgotten that the action of the President now questioned has been exercised under several administrations. 5 Ops. Atto. Gen'l, 288. But "*quod ab initio non valet, tractu temporis non convalescit*," is the rule for cases which contradict constitutional principles.

PHILLIPS & MCKENNEY,
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S. H. Phillips, } on brief
F. D. McKenney, }

APPENDIX.

TENURE OF OFFICE OF TERRITORIAL JUDGES SINCE 1787, AS SHOWN BY THE ORIGINAL ORGANIC STATUTES.

Ohio, (1787): Originally *the Eastern Division* of the Northwest Territory. Tenure of office of judges, "*good behavior.*" Ordinance of 1787, 1 Stat., 51, note, paragraph 4. At the same time the tenure for *executive*, and certain *legislative*, officers was *for years*, unless their commissions were "sooner revoked, &c., by Congress" (par. 3, etc.), and in 1789, after the adoption of the Constitution, this power was transferred to the President. Act. of 1789, ch. 8, 1 Stat., 50.

Mississippi, (1798): "*Good behavior.*" [The organization of the Territory being effected by words authorizing the establishment of "a government in all respects similar" to that of the Northwest Territory.] 1 Stat., 550 (sec. 3).

Indiana, (1800): "*Good behavior.*" [The Territory being originally a part of the Northwestern, and its organization being effected by the phrase above quoted in the case of Mississippi.] 2 Stat., 59 (sec. 2).

DISTRICT OF COLUMBIA, (1801): "*Good behavior.*" 2 Stat., 105 (sec. 3). The original system of courts was abolished in 1863 (12 Stat., 764, sec. 16), and the same term given to the judges then authorized. (Sec. 1.)

Michigan, (1805): "*Good behavior.*" [As in the case of Indiana.] 2 Stat., 309 (sec. 2).

Illinois, (1809): "*Good behavior.*" As in the case of Indiana. 2 Stat., 514 (sec. 2).

Alabama, (1817): "*Good behavior.*" As in the case of Mississippi. 3 Stat., 372 (sec. 2).

Wisconsin, (1836): "*Good behavior.*" 5 Stat., 13 (sec. 9).

Louisiana, as "*Orleans*," (1804): "*Four years.*" 2 Stat., 284 (sec. 5).

Missouri, [in 1804 [preceding Stat., sec. 12,] as "*Louisiana*," the courts were held by the Indiana judges] (1812): "*Four years unless sooner removed.*" 2 Stat., 746 (sec. 10).

Arkansas, (1819): "*Four years, unless sooner removed by the President.*" 3 Stat., 495 (sec. 7).

Florida, (1822): "*Four years, and no longer.*" 3 Stat., 657 (sec. 8)

Iowa, (1838): "*Four years.*" 5 Stat., 238 (sec. 9).

Oregon, (1848): "*Four years, and until their successors shall be appointed and qualified.*" 9 Stat., 326 (sec. 9).

Minnesota, (1849): "*Four years.*" 9 Stat., 406 (sec. 9).

New Mexico, (1850): "*Four years.*" 9 Stat., 449 (sec. 10).

Utah, (1850): "*Four years.*" 9 Stat., 455 (sec. 9).

Washington, (1853): "*Four years, and until, etc.*" 10 Stat., 175 (sec. 9).

Nebraska, (1854): "*Four years, and until, etc.*" 10 Stat., 280 (sec. 9).

Kansas, (1854): "*Four years, and until, etc.*" 10 Stat., 286 (sec. 27).

Colorado, (1861): "*Four years.*" 12 Stat., 174 (sec. 9).

Nevada, (1861): "*Four years.*" 12 Stat., 212 (sec. 9).

Dakota, (1861): "*Four years.*" 12 Stat., 241 (sec. 9).

Arizona, (1863): "*Four years.*" 12 Stat., 665 (sec. 2).

Idaho, (1863): "*Four years.*" 12 Stat., 811 (sec. 9).

Montana, (1864): "*Four years, and until,*" &c. 13 Stat., 88 (sec. 9).

Wyoming, (1868): "*Four years, unless sooner removed by the President, with the consent of the Senate.*" 15 Stat., 180 (sec. 9).

Alaska, (1884): "*Four years, and until,*" &c. 23 Stat., 26 (sec. 9).

Oklahoma, (1890): "*Four years, and until,*" &c. 26 Stat., ch. 182, sec. 9.

Number of Territories above, having originally an *express* judicial tenure of *good behaviour*	8
Number, with an *express* tenure of "*four years*," (varied immaterially)	21
Total	29

MEM.—As regards "*removal*" it is submitted in this connexion that in case of *judges* this word in American con-

stitutional law presumes "*cause*," and "*notice:*" see State Constitutions, *passim;* ex. gr., Missouri, (1875); Ohio, (1851); Tennessee, (1876); Texas, (1876); Virginia, (1870); Wisconsin, (1848); Maryland, (1867); Michigan, (1850); Oregon, (1857). It may be that the question of *ill behavior* need not be passed upon by a Court, or by Congress. Some commission, (a *Governor*, or another,) created by public law might be *due process.* Hurtado's Case, 110 U. S., 516, 537.

FILED.
MAR 20 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WARD MCALLISTER, JR., APPELLANT,
vs.
THE UNITED STATES.
No. 238.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WARD MCALLISTER, JR., APPELLANT,
vs.
THE UNITED STATES. } No. 238.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from the Court of Claims, wherein the appellant sought to recover a judgment against the United States of $3,070, as his salary as judge of the district court of Alaska. He was appointed by President Arthur, by and with the advice and consent of the Senate, and qualified by oath on the 23d of August, 1884. On the 21st of July, 1885, President Cleveland suspended him from office, and designated Edward J. Dawn, of Oregon, to perform the duties. Dawn qualified on August 20, 1885.

On December 3, 1885, Dawn was suspended by President Cleveland, and Lafayette Dawson was designated to peform the duties of such officer. Dawson qualified on the 16th of December, 1885. On the 2d of August, 1886, Dawson was appointed, by and with the advice and consent of the Senate, and qualified on the 3d of September, 1886. McAllister received the salary as district judge for the district of Alaska up to and including August 28, 1885, and now claims that he is entitled to receive the salary as such judge from that date until Dawson qualified under the appointment of President Cleveland made, by and with the advice and consent of the Senate, on September 3, 1886.

The claim is based on the ground that the President had no power under the law to suspend him from office and to designate other persons to perform the duties. The whole case rests on the construction of section 1768 of the Revised Statutes, under which, in suspending McAllister and designating Dawn and Dawson to perform his duties, President Cleveland expressly acted. The section is as follows:

> During any recess of the Senate the President is authorized, in his discretion, to suspend any civil officer appointed, by and with the advice and consent of the Senate, *except judges of the courts of the United States*, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed, in his discretion, by the designation of another, to perform the duties of such suspended officer in the mean time; and the person so designated shall take the oath and give the bond required by law to be taken and given by the suspended

officer, and shall, during the time he performs the duties of such officer, be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended. The President shall, within thirty days after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, nominate persons to fill all vacancies in office which existed at the meeting of the Senate, whether temporarily filled or not, and also in the place of all officers suspended; and if the Senate during such session shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable to the same session of the Senate for the office.

This section, with others, has been repealed by the act of March 3, 1887, chapter 353, 24 Statutes at Large, page 500; but the repeal did not affect any officer theretofore suspended under the provisions of the section, or any designation, nomination, or appointment theretofore made by virtue of the provisions thereof.

ARGUMENT.

It is not proposed to enter into the question of the right of Congress to limit the power of appointment and removal by the President as it was limited in the tenure of office act, of which section 1768 was a part. Under the decision in *Embry's Case* (100 U. S. R., 680–685), it is clear that in a suit to recover salary this constitutional question is not involved. The only point for discussion here is whether the language of section 1768 applies to a

judge of the district court of Alaska, or whether such judge is within the exception of that section "except judges of the courts of the United States." Is the judge of the district court of Alaska a judge of a court of the United States within the meaning of the term as used in section 1768. We claim that he is not. If he is, then the appellant was entitled to the judgment which he sought below; if he is not, the judgment of the Court of Claims should be affirmed.

Section 1768 was taken from the second section of an act to amend an act regulating the tenure of certain civil officers (16 Statutes, page 6). The only change in the language of the original section is that the exception is stated as follows:

> "Except judges of the United States courts" instead of "except judges of the courts of the United States."

The district court of Alaska was established by the organic act of the Territory of Alaska May 17, 1884 (23 Stats., p. 24). By the first section of that act the Territory ceded to the United States by Russia is constituted a civil and judicial district, the government of which is to be organized and administered as in the act provided.

The second section provides that a governor shall be appointed for the district by the President. He is charged with the enforcement of the laws; is commander in chief of the militia of the district, and is to grant reprieves for offenses which shall operate until the decision of the President thereon is made known.

The district court—the court here in question—is established by the third section, which provides as follows:

> That there shall be, and hereby is, established a district court of said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed for said district who shall, during his term of office, reside therein and hold at least two terms of said court therein in each year—one at Sitka, beginning on the first Monday in May, and the other at Wrangel, beginning on the first Monday in November. He is also authorized and directed to hold such special sessions as may be necessary for the dispatch of the business of said court, at such times and places in said district as he may deem expedient, and may adjourn such special session to any other time previous to a regular session. He shall have authority to employ interpreters and to make allowances for the necessary expenses of his court.

Section 4 directs that a clerk shall be appointed for the courts who is to be *ex officio* secretary and treasurer of said district, a district attorney, and a marshal. The clerk of the court is also to be *ex officio* recorder of deeds and mortgages, and to establish officers in the towns of Sitka, Wrangel; and, if directed by the district court, is to establish officers at the other various settle nents in the district.

Section 5 provides for the appointment of four commissioners, who are to have the jurisdiction and powers of

United States circuit court commissioners in said district; also, to exercise all the powers, civil and criminal, belonging to justices of the peace in the State of Oregon; also, to have jurisdiction, under the supervision of the district judge, in testamentary and probate matters; also, to have power to grant writs of habeas corpus, to be made returnable before the district judge; and to have the powers of notaries public.

Section 6 provides that the marshal shall have the general power and authority of the United States marshals for the States and Territories and shall execute the process of the court and of the commissioners.

Section 7 declares the general law of Oregon in force at the time of the passage of the act to be the law in the district, so far as the same may be applicable, and continues as follows:

> But the said district court shall have exclusive jurisdiction in all cases in equity or those involving a question of title to land, or mining rights, or the constitutionality of a law, and in all criminal offenses which are capital. In all civil cases at common law any issue of fact shall be determined by a jury, at the instance of either party; and an appeal shall lie in any case, civil or criminal, from the judgment of said commissioners to the said district court where the amount involved in any civil case is two hundred dollars or more, and in any criminal case where a fine of more than one hundred dollars or imprisonment is imposed, upon the filing of a sufficient appeal bond by the party appealing, to be approved by the court or commissioner. Writs of error in criminal cases shall issue to the said district court from the United States circuit court for the district

of Oregon in the cases provided in chapter one hundred and seventy-six of the laws of eighteen hundred and seventy-nine; and the jurisdiction thereby conferred upon circuit courts is hereby given to the circuit court of Oregon. And the final judgments or decrees of said circuit and district courts may be reviewed by the Supreme Court of the United States as in other cases.

Section 8 makes the district of Alaska a land district of the United States.

Section 9 is as follows:

That the governor, attorney, judge, marshal, clerk, and commissioners provided for in this act shall be appointed by the President of the United States, by and with the advice and consent of the Senate, and shall hold their respective offices for the term of four years, and until their successors are appointed and qualified. They shall severally receive the fees of office established by law for the several offices the duties of which have been hereby conferred upon them, as the same are determined and allowed in respect of similar offices under the laws of the United States, which fees shall be reported to the Attorney-General and paid into the Treasury of the United States. They shall receive respectively the following annual salaries: The governor, the sum of three thousand dollars; the attorney, the sum of two thousand five hundred dollars; the marshal, the sum of two thousand five hundred dollars; the judge, the sum of three thousand dollars; and the clerk, the sum of two thousand five hundred dollars, payable to them quarterly from the Treasury of the United States. The district judge, marshal, and district attorney shall be paid their actual, necessary expenses when traveling in the discharge of their official duties. A detailed account shall be rendered of such expenses under oath,

and as to the marshal and district attorney such account shall be approved by the judge, and as to his expenses by the Attorney-General. The commissioners shall receive the usual fees of United States commissioners and of justices of the peace for Oregon, and such fees for recording instruments as are allowed by the laws of Oregon for similar services, and in addition a salary of one thousand dollars each. The deputy marshals, in addition to the usual fees of constables in Oregon, shall receive each a salary of seven hundred and fifty dollars, which salaries shall also be payable quarterly out of the Treasury of the United States. Each of said officials shall, before entering on the duties of his office, take and subscribe an oath that he will faithfully execute the same, which said oath may be taken before the judge of said district *or any United States district or circuit judge*. That all officers appointed for said district, before entering upon the duties of their offices, shall take the oaths required by law and the laws of the United States, not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto; but there shall be no legislative assembly in said district, nor shall any delegate be sent to Congress therefrom. And the said clerk shall execute a bond, with sufficient sureties, in the penalty of $10,000 for the faithful performance of his duties, and file the same with the Secretary of the Treasury before entering on the duties of his office; and the commissioners shall each execute a bond, with sufficient sureties, in the penalty of $3,000, for the faithful performance of their duties, and file the same with the clerk before entering on the duties of their office.

The remaining 5 sections of the act are not material here.

The district court of Alaska, as will be seen from the foregoing provisions, acts first, as a district court of the United States; second, as a district court of the United States with the powers of a circuit court; and third, as a court of general jurisdiction to enforce the laws of Oregon made by this act the laws of the district. While the court is a district court, organized under the authority of the United States, with all the powers of a district court of the United States, it is not a United States court within the meaning of the exception contained in section 1768, because its jurisdiction is very much wider than the jurisdiction of United States courts, so called, and it is in fact a Territorial court.

It is created not by virtue of article 3 of the Constitution to exercise the judicial power of the United States therein conferred, but is created by virtue of article 4 under the law authorizing Congress to make needful rules and regulations for the government of the Territories. The judge of the court does not hold his office during good behavior as all judges of the United States courts under the Constitution must.

These propositions are amply sustained by a number of decisions of this court. In *American Insurance Company* v. *Canter* (1 Pet., 511) the question was whether the superior court of the Territory of Florida was a court of the United States, and Mr. Chief-Justice Marshall uses the following language:

> We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts,

> shall hold their offices during good behaviour." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress on the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them Congress exercises the combined powers of the general and of a State government.

In *Benner* v. *Porter*, (9 How., 235), in discussing the character of the court of appeals of Florida, Mr. Justice Nelson used the following language (p. 243):

> By article 3, section 1 : "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their office during good behavior." Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must possess the con-

> stitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal Government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for 4 years (1 Pet., 546). Neither were they organized by Congress under the Constitution, as they were vested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State.

In *Clifton* vs. *Englebrecht* (13 Wall., 434–447) the question was whether the law in relation to the summoning of jurors in United States courts applied to juries of the district court of Utah. It was held that it did not apply, even where the court was exercising the jurisdiction of courts of the United States, conferred on it by the organic act. Said Chief-Justice Chase:

> The judges of the Supreme Court of the Territory are appointed by the President under the act of Congress; but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in the *American Insurance Company* vs. *Canter* (1 Pet., 546), and in the later case of *Benner* vs. *Porter* (9 How., 235). There is nothing in the Constitution which would prevent Congress from conferring the jurisdiction which they exercise if the judges were elected by the people of the Territory and commissioned by the governor. They might be clothed with the same authority to decide all cases arising under the Constitution and laws of the United States, subject to the same revision. In-

deed, it can hardly be supposed that the earliest Territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period.

There is no Supreme Court of the United States, nor is there any district court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the General Government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States.

In *Hornbuckle* vs. *Toombs* (18 Wall., 648, 655) where the question was whether in the Territorial courts it was necessary to conduct proceedings so as to preserve the distinction between actions at law and in equity, Mr. Justice Bradley used the following language:

The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the Federal system, and as invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments. They were not intended as exertions of the plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and district courts to follow the practice of the respective State courts in cases at law, and that they supply no other rule in such cases,

> shows that they can not apply to the Territorial courts. As before said, *these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.*

In *Good* v. *Martin* (95U. S. R., 90) Mr. Justice Clifford, on page 98, said :

> Territorial courts are not courts of the United States within the meaning of the Constitution, as appears by all the authorities (citing *Clinton* v. *Englebrechht*, and *Hornbuckle* v. *Toombs*).

In *Rennels* v. *United States* (98 U. S. R., 145–154) Mr. Chief-Justice Waite said :

> By section 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. We have often so decided (*American Insurance Company* v. *Canter*, 1 Peters, 511 ; *Benner et al.* v. *Porter*, 9 How., 235 ; *Clinton* v. *Englebrecht*, 13 Wall., 434). They are courts of the Territories invested for some purposes with the powers of the courts of the United States.

In the *City of Panama* (101 U. S. R., 453–460) the question was whether the district courts of Washington Territory could exercise admiralty jurisdiction. The organic act provided that these courts should have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the Territory. It was held that the district courts of the Territory had

admiralty jurisdiction. In this case Mr. Justice Clifford, in delivering the judgment of the court, said:

> Our Constitution, in its operation, is coextensive with our political jurisdiction, and wherever navigable waters exist within the limits of the United States, it is competent for Congress to make provision for the exercise of admiralty jurisdiction, either within or outside of the States; and in organizing Territories Congress may establish tribunals for the exercise of such jurisdiction, or they may leave it to the legislature of the Territory to create such tribunals. Courts of the kind, whether created by an act of Congress or a territorial statute, are not, in strictness, courts of the United States; or in other words, the jurisdiction with which they are invested is not a part of the judicial power defined by the third article of the Constitution, but is conferred by Congress in the execution of the general power which the legislative department possesses to make all needful rules and regulations respecting the public territory and other public property.

Could there be a stronger array of authority in favor of the proposition that the expression "courts of the United States" or "United States courts" refers to those courts which are organized under the third article of the Constitution, whose judges hold their offices during good behavior. The corollary of this proposition is that no court whose judge, by law, has a less term of office than during good behavior, is a court of the United States.

It is true that in the preliminary hearing on the motion for leave to file a petition for prohibition in the matter of the *Sayward*, this court held that section 688 of the Revised Statutes, giving the Supreme Court power to issue

writs of prohibition to the district courts when proceeding in admiralty and maritime jurisdiction, gave the court power to issue such writs to the district court of Alaska, proceeding as a district court of the United States, in the administration of admiralty jurisdiction. There was no opinion rendered in that case.

Exactly what the conclusion of the court was based upon was not stated in the announcement by the Chief Justice. It is submitted that the only ground upon which that decision could be put is that where the district court of Alaska was acting as a district court of the United States, and as such was proceeding in admiralty, it came within section 688, in so far as to confer jurisdiction upon this court to issue writs of prohibition to it. It could not have been based on the proposition that the district court of Alaska was a court of the United States.

If the latter was the ground upon which the decision of the Supreme Court proceeded, then it is fully conceded that the claimant here is entitled to recover. Indeed it is difficult to see why, if that was the ground upon which the Supreme Court allowed the petition to be filed in the Sayward case, McAllister should not be permitted to recover his salary up to the present time, and from now on until his death. If the district court of Alaska was a court of the United States, then by virtue of the Constitution, its judge held for life.

It is said that these decisions, which have been referred to at some length, involve only questions of practice, and were only intended to lay down a distinction between Territorial courts and courts of the United States in the ap-

plication of statutes governing the practice of the courts, but that they have no application in a case involving the tenure of office like the present. If there is any distinction between courts of the United States and other courts organized under the authority of the United States it is in the fact that judges of courts of the United States are given by the Constitution a tenure of office during good behavior.

In a statute, therefore, which was intended to affect the tenure of office of all civil officers appointed by and with the consent of the Senate, the use of such an expression as "courts of the United States" would seem to be especially directed to the distinction that judges of the courts of the United States have a tenure of office which does not make them subject to suspension by the President and have a right to the salary provided by law without diminution by such suspension. The exception was a mere recognition of the inability of Congress to give the President power to suspend a judge of a court of the United States or cut off his salary, in view of his life tenure and security from diminution of salary under the Constitution, and it is nothing more. It was a recognition of the principle stated by Mr. Chief Justice Waite in the case of *Embrey* v. *The United States* (100 U. S., 680), in which the tenure of office act was under discussion, where he says, on page 685:

> The question here presented is not one of office but of salary. Wherever the power of removal from office may rest all agree that Congress has full control of salaries, except those of the President and the judges of the courts of the United States. The

> amount fixed at any one time may be added to or taken from at will. No officer, except the President or a judge of a court of the United States, can claim a contract right to any particular amount of unearned compensation.

It will hardly be contended that the Chief Justice, in the expression, "courts of the United States," was referring to courts whose judges held office for a term of years.

If nothing was intended by the expression "of the United States" in the exception in section 1768, except to indicate courts organized under the authority of the United States, then it is difficult to see why the words "of the United States" were inserted at all. Congress could not provide that the President should suspend from office the judge of any court but a court organized under the authority of the United States.

The words "of the United States," in the construction contended for by counsel for the claimant, would be as superfluous as they would be if inserted after the words "any civil officer" in the preceding line in the same section.

The expression "of the United States" is therefore to be given its full effect, which is to distinguish between courts known as courts of the United States and created under Article III of the Constitution, and other courts appointed under authority of the United States not by virtue of that article, but under the fourth article of that instrument.

It is contended on behalf of the claimant that as the term of office of McAllister was for 4 years, without any

provision in the organic act of Alaska that he should be subject to removal by the President before the end of such term, the President had no power to suspend under section 1768. But section 1767 is a specific provision for such removal or suspension, which by virtue of its language was in effect incorporated in the organic act of Alaska. It is as follows:

> Every person holding any civil office to which he has been or hereafter may be appointed, by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he was appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided.

It is respectfully submitted that within the tenure of office act the district court of Alaska was not a United States court, or a court of the United States, and that therefore its judge was a civil officer appointed by and with the advice and consent of the Senate, to whom section 1768 had full application.

WM. H. TAFT,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WARD MCALLISTER, JR., APPELLANT,
vs.
THE UNITED STATES.
No. 238.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

As was anticipated, the point is made by the claimant in this case that the term of office of the judge under the Alaska act is for four years without qualification, and that therefore the President was not empowered to remove him during that term.

It should be noted that the same language, fixing the term of the judge for four years, applies also to the governor, the district attorney, the marshal, the clerk, and the commissioners. The contention, therefore, must be not only that the judge is irremovable by the President, but also that all these other officers are, a result which is so

inconsistent with the general policy of Congress in securing to the President control over officers whose duties are purely executive as to weaken the contention with regard to the irremovable tenure of the judge.

The remarks of Chief Justice Marshall in *Marbury* vs. *Madison* (1 Cranch, 153), with respect to the tenure of a justice of the peace of the District of Columbia have no application to the case at bar, because sections 1767 and 1768 introduced into every law thereafter passed creating offices the provision that the officer may be removed during his term, in accordance with those sections.

The argument is made that because the Territory of Wyoming was organized after the tenure of office act, and contained a qualification of the language fixing the term for 4 years by the words "unless sooner removed by the President, by and with the advice and consent of the President," the absence of such language in the act of 1884, passed 16 years afterwards, is evidence that Congress did not intend sections 1767 and 1768 to apply to the Alaska offices. The force of this argument does not impress one.

The difference between the various Territorial acts in language and provisions ought not to be taken as an implication of anything. An examination of them will show that they often contain repetitions of sections in the general law which are unnecessary, and that their form is usually determined by the interested persons who draw the bills. There is no uniformity in their framework such as to make the absence of a provision in one which appears in another significant, especially if such a provision is supplied by the general law.

Reference is also made to the dissenting opinion of Mr. Justice McLean in the case of the *United States* vs. *Guthrie* (17 How., 284). There the question was whether a judge of a Territorial court who had been removed by the President before the expiration of his term of office could by mandamus compel the Secretary of the Treasury to pay him his salary for the time between his removal and the end of his term. The court refused to pass upon the question whether the removal was within the power of the President, and based its refusal to grant the writ on the ground that the payment of the money was not a ministerial duty, but one intrusted to the discretion of the Secretary, and could not be controlled by mandamus.

Three of the judges concurred in the majority opinion on the ground that salary could not be recovered by mandamus until the title to the office had been legally tried and determined. Mr. Justice McLean dissented, holding that the President had no power to remove a judge of a Territorial court before the end of his term. His argument was that the power of removal in the President is based on the presumption arising from his power to appoint, and his duty to see that the laws are faithfully executed, but that such presumption could not apply to judicial officers for the discharge of whose duty he was in no wise responsible. It should be noted that in the statute creating the office of judge, which was involved in that case, the term of executive officers in the same statute was for 4 years, unless sooner removed, while the words "unless sooner removed" were omitted in the section fixing the term of office of the judge, which made it a much stronger case than the one we have at bar. Justice Mc-

Lean admits that Congress has the right to give the President the power to remove judicial officers of the Territories, for he says on page 516 :

> It is true that for the Territories of Missouri and Arkansas, the judges were appointed for the term of 4 years "unless sooner removed." This language was used for the Missouri Territory, and as the Arkansas Territory was taken from Missouri, the same language was incorporated into the organic law of Arkansas. These two Territories out of the nineteen above named would imply the power to remove the judges. But whether this language was the result of accident or design, it can not authorize the construction of the law establishing the other Territories, among which the Territory of Minnesota is included, as though the power of removal applied to them. The words used will not allow this construction, especially when taken in connection with the words in the same acts in relation to the appointment of officers in the Territories other than the judges.

Our contention here is that there is an express provision in sections 1767 and 1768, as applied to the Alaska act of 1884, for the removal of the judge of Alaska before the end of his term, which brings us back to the question discussed in the original brief, whether a judge of the court of Alaska is within the exception in section 1768 of judges of "courts of the United States."

WM. H. TAFT,
Solicitor-General.